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SOME ASPECTS OF COPYRIGHT LAW IN USA

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Abstract: Parody has proven to be a difficult matter in c, especially in the United Kingdom in recent years. This is understandable because for a parody to be successful it is necessary to take a part of the source work, otherwise the public will not understand it. When, however, this part forms a substantial part of the source, the parodist infringes copyright. It is easy to understand the problem: the parodist has to conjure up the source work, but he cannot take a substantial part.
Case law shows that courts, in the absence of legislation in this field, seem to disagree on the appropriate treatment of parody. The aim of this work is to show that parody needs special treatment in copyright law. I will start by explaining what is parody and why it is important. Then I will analyse case law on parody and copyright to show the developments which have taken place, not only in the United Kingdom, but also in the United States. The next step is to consider whether the United Kingdom's fair dealing provisions or the United States' fair use provisions effectively address the problem. I will go on to discuss the freedom of expression difficulties which may arise in parody cases. I will also briefly comment on the law in other European countries, because the European Directive on Copyright 2001/29 gives room for special provisions and some countries made use of this. And in conclusion I will give my view on what should be the treatment of parody in copyright law.
Keywords: copyright law, treatment of parody, European Directive on Copyright.

INTRODUCTION

Almost every work on parody goes back to the origins of the word in. The word 'parody' comes from parôidia (παρωδια), deriving from 'para' and 'odê'. 'Para' means beside, alongside or near. 'Odê' means song. The usual translation therefore is 'a song sung alongside another' and implies comparison between the parody and its original. But as this translation suggests neutral comparison, there are scientists who are of the opinion that 'para' also bears a more adversative, aggressive meaning of counter and against. With this connotation parody comes much closer to satire or burlesque, because ridicule, distortion and mockery are essential ingredients.[273]
The unsatisfying conclusion is that many of the cultural scientists agree that there cannot be a single definition of parody.[274] However, it is possible to give some characteristics:[275]

- parody requires that the public knows the source work;
- the source work may be art works in every form;
- parody involves both closeness to and distance from its source material, because the source work is not uncritically devoted but transformed in – often – a witty way and it differs in this way from plagiarism;
- parody is capable of simultaneously showing disapproval and respect, criticism and sympathy, parasitism and creativity;
- in some cases, the source work is the target, in others it is merely a weapon;
- often laughter if provoked, because of the dislocation of the source work. On the other hand, parody may cause anger or shock.

Even though the cultural scientists disagree upon the exact meaning of the word, a workable legal definition is to be found in the judgment of Judge Nelson in the *Acuff-Rose* case: 'a parody is a work that transforms all or a significant part of an original work of authorship into a derivative work by distorting it or closely imitating it, for comic ... effect, in a manner such that both the original work of authorship and the independent effort of the parodist are recognizable.'[276]

What then is the importance of parody? In the first place, parody is a form of entertainment. Although it may cause shock or anger, generally, the public likes parodies. But a good parody does more than just entertaining. The

[273] C. Rütz, 'Parody: A Missed Opportunity?' (2004) 3 *I.P.Q.* 284.
[274] Hess, *Urheberrechtsprobleme der Parodie* (Baden-Baden, 1993).
[275] C. Rütz, 'Parody: A Missed Opportunity?' (2004) 3 *I.P.Q.* 284.
[276] *Acuff-Rose Music Inc v Campbell* (6th Cir. 1992) 972 F.2d 1429.

parodist tries to express himself by using the source work. He can criticise the source work itself ('target parody'), or he can express his views on more general things; society, certain contemporary ideas, life-styles, politics and so on ('weapon parody'). Hutcheon calls parody 'one of the major forms of self-reflexivity in twentieth-century art forms, making the intersection of creation and re-creation, of invention and critique.'[277]

I am of the opinion that parody is a very important phenomenon nowadays, especially in this world that is getting faster and faster; a parody in a single cartoon or song can say more than thousand words and replies in this way to the 'need for speed' in our internet and mobile phones society.The question is what aspect of parody makes it so difficult to reconcile with copyright law. Copyright protects the expression of ideas.[278] The owner of the right can issue copies of the work and he can allow others to do that, usually after payment of a certain amount of money. The parodist, however, takes a part of the source work without the consent of the copyright holder and alters or dislocates this part. The difficulty with this is that the parodist himself does a lot of original work and it can be said that he created a new original work. The law seems to have difficulties with the fact that the parodist creates a new work. In Spence's words: '... lawyers have tended to assume that ... the activity of 'creators' does not depend upon existing work and that the activity of 'users' is rarely creative. But the parodist is both a 'creator' and a 'user'.'[279]

For a copyright to be infringed the owner of the right has to show that the alleged infringer has taken a 'substantial part' of the original work. Parody is imitative and allusive by nature and to be effective, it has to conjure up the source work. In other words, the parodist has to balance between conjuring up the source work by taking parts and not taking that much as constituting a substantial part.

I will now consider how the courts have dealt with parody cases.

EU COPYRIGHT DIRECTIVE

In 2001 the EU came with Directive 2001/29 on the harmonization of certain aspects of copyright and related rights in the information society.[280] It allows Member States to 'provide for exceptions or limitations to the rights in the case of use for the purpose of caricature, parody or pastiche'. It may be clear from the aforesaid that the United Kingdom did not make use of this. It is interesting to consider the situation in other European countries which did make use of this or already had special provisions.

Specific defences are contained in the French and Spanish copyright statutes.[281] The French Intellectual Property Code states that an author must not prohibit 'la parodie, le pastiche et la caricature, compte tenu des lois du genre'. Interestingly, there is no strict differentiation required between parody, pastiche and caricature and there is no definition of any of those. This permits flexibility and the courts have shown a liberal attitude towards parody. A restriction given by the courts is that the parody must not create any risk of confusion with the source work. If the parody injures or degrades the original author, moral rights can be invoked. The same applies to Spain: there should be no risk of confusion and no harm to the original author, otherwise the parody does not fall within the specific defence to infringement.[282]

In Germany a system of fair use is operating: 'freie Benutzung'.[283] The provision can be summarized as follows: parody usually enjoys the privilege of fair use where it has enough 'inner distance' to the old work and is recognizable as such. Inner distance means that the new work should appear to be independent. In Germany this means that the parody should be a target parody, although the critical and humorous elements of the parody do not have to target the original work itself, but can also target the subject and topic displayed by the original work.[284]

PARODY AND FREEDOM OF EXPRESSION

Another difficulty parody presents in copyright is the problem of freedom of expression. At first sight copyright may seem at odds with the principle of free speech because it restrains individuals from expressing themselves in the way they like.[285] However, copyright does not protect ideas, but only the expression of ideas. It can therefore be argued that speech is still free because copyright does not cover the content of an expression. See for example the case of

[277] L. Hutcheon, *A Theory of Parody* (1985).
[278] For example: *Designers Guild Ltd v Russell Williams (Textiles) Ltd* (2000) 1 WLR 2416, HL.
[279] Spence, 'Intellectual Property and the Problem of Parody' *L.Q.R.* 1998, 114(Oct), 594 – 620.
[280] (2001) O.J. L167/10.
[281] C. Rütz, 'Parody: A Missed Opportunity?' (2004) 3 *I.P.Q.* 284.
[282] L. Gimeno, 'Parody of songs: a Spanish case and an international perspective', *Ent. L.R.* 1997, 8(1), 18-22.
[283] § 24(1) Urheberrechtsgesetz.
[284] C. Rütz, 'Parody: A Missed Opportunity?' (2004) 3 *I.P.Q.* 284.
[285] Spence, 'Intellectual Property and the Problem of Parody' *L.Q.R.* 1998, 114(Oct), 594 – 620.

Associated Newspapers v News Group Newspapers: 'A person is not in any way prohibited from saying exactly what he likes … if he cannot publish it in the precise words which somebody else has used, which is the essence of copyright. Freedom of speech is interfered with when someone is not allowed to say what is the truth.'[286]

However, as Burrell points out, this view ignores that 'virtually all textual and visual material will be clothed in copyright' which means that it becomes almost impossible to support an argument by taking a part from another work.[287]

Spence accepts that there are two situations in which freedom of speech and intellectual property are incompatible.[288] The first is 'the situation in which it is necessary, in order to comment upon a particular text or its creator, to draw from that text itself.' This aspect is recognised in s. 30(1) about fair dealing by means of criticism or review, but as indicated before, there will be few parodies that can rely on fair dealing because they usually do not refer to the original author. The second is 'the situation in which a text protected by an intellectual property right has become shorthand for a range of meanings for which no adequate alternative means of expression exists.'

Parody is a problem because it covers both situations: the parodist takes from a copyrighted work to criticize, using the part taken as shorthand for a range of values that the parody ironically undercuts.

In the first situation the freedom of speech should prevail over the copyright because the taking of a part of the copyrighted work is only ancillary to the purpose of criticism. In other words, the substantial part test should not be used here because it does not take into account the right to freedom of expression. Spence makes a distinction here between target parodies and weapon parodies, contending that this only applies to target parodies, but I do not see why. Both in target parody and in weapon parody, the taking of a (substantial) part is ancillary to the purpose of criticism.

Another argument for abolishing the substantial part test related to the freedom of speech is the fact that since the Human Rights Act came into force, existing statutes should be interpreted in a way compatible with the right of free speech. In *Ashdown v Telegraph*[289] the Court of Appeal accepted that copyright could act as an illegitimate restriction on freedom of expression in certain circumstances. In such circumstances the general public interest defence of s. 171(3) would be available. The Court of Appeal departed here from the earlier decision in *Hyde Park Residence v Yelland*[290] in which it held that there is no general public interest defence in the United Kingdom.

Another interesting aspect of the case is that the Court admitted that in some circumstances the form of expression is equally important as the information it conveys. This means that the possibility for the parodist to put his message in another – not infringing – way cannot be an argument. This is especially important for weapon parody because the usual argument against protection of this type of parody is that there is no necessity to use the copyrighted work.

CONCLUSION

It may be clear from the aforesaid that in my view the substantial part test should be abolished. It is far too rigid and it does not recognise the nature of parody, in that a parodist has to take a substantial part in order to conjure up the original. But having said this, it is very difficult to find the right approach. The reasons for this are that there is no single definition of parody, that there is weapon parody and target parody, that the approach should not be too rigid as to make parody virtually impossible but it should also not be too liberal as that would seriously undermine the position of the copyright holder and may be a disincentive for potential creators. One suggested solution is the set up of a compulsory licensing system. The parodist should apply for a licence. The argument is that 'when a parodist offers a royalty to the copyright holder that adequately compensates him, refusals to license should not be sanctioned as they are based on non-economic motives not protected by copyright law.'[291] However, it is said that licensed parodies cannot be real parodies: 'How can a parody criticise the establishment if the establishment says 'right on'?'[292] A more convincing argument against a compulsory licence system is that the freedom of expression aspects are not dealt with in a satisfactory way: the fact that the parodist has to pay and the unpredictability of the amount, may restrict him in view of the financial burden placed on him.[293]

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[286] *Associated Newspapers v News Group Newspapers* (1986) R.P.C. 515,517.
[287] R. Burrell, 'Reining in Copyright Law: Is Fair Use the Answer?', *I.P.Q.* 2001 No 4, 361-388.
[288] Spence, 'Intellectual Property and the Problem of Parody' *L.Q.R.* 1998, 114(Oct), 594 – 620.
[289] *Ashdown v Telegraph* (2001) 4 All E.R. 666.
[290] *Hyde Park Residence v Yelland* (2001) 1 Ch.143.
[291] C. Rütz, 'Parody: A Missed Opportunity?' (2004) 3 *I.P.Q.* 284.
[292] Yonover, 'Artistic Parody: The precarious balance: Moral Rights, Parody and Fair Use', 14 *Cardozo Arts and Entertainment Law Journal* 79.
[293] C. Rütz, 'Parody: A Missed Opportunity?' (2004) 3 *I.P.Q.* 284.

What about the fair use approach? This approach offers several advantages; there are different factors which play a role and this allows a much more balanced view on the difficulties of parodies. A disadvantage is the uncertainty that the case-by-case treatment brings in. The US approach in their fair use provisions has been criticized because it only applied to target parody and only to parody which is ridiculing distortion and criticizing. However, there are several factors in the fair use treatment that should definitely play a role in the treatment of parody:

- the purpose and character of the use; when it is merely for commercial purposes there should be less protection;
- the amount taken from the original; the more the parodist takes, the more he has to add elements himself. And the amount he cán take depends on the first factor; for commercial purposes is less allowed;
- the effect of the use on the potential (derivative) market; when a parody is competitive with the original, less is allowed. When the parody alters the (chances on the) derivative market, less is allowed.

Rütz proposes a parody defence to be introduced into the CDPA as follows:

'Parody does not infringe any copyright in the work provided that the transformative use outweighs any commercial motive and that the parody criticises the copyrighted work or its subject and surrounding. A parody will infringe copyright if it lacks sufficient inner distance from the copyrighted work, especially if it copies significantly more than is adequate to conjure up the original work in the interest of humour and criticism.'

This is in many ways a very attractive approach. Five elements can be distinguished, each of which I will discuss.

(1) *The transformative use has to outweigh any commercial motive.* This should mean that the first purpose of the parody should be to do something original, humorous, ironic, critical or whatever but not something merely for commercial purposes. This suggests that the parody in *Schweppes* would not be able to claim protection under this defence because here the primary goal of the parody was to make money out of it; they wanted to free ride on the reputation of Schweppes and had no intention to criticize Schweppes or society. They just wanted to sell more bottles. I totally agree with this first element.

(2) *The parody should criticise the original work or its subject and surrounding.* It is not completely clear for me whether this covers weapon parody. Weapon parody criticises society or contemporary values and ideas, but those are not necessarily part of the 'subject and surroundings' of the original. In my view there should be no distinction in the level of protection for weapon parody and target parody. I repeat the reasons I mentioned before: (i) often a particular work will be the most appropriate for spreading the parodist's message. (ii) It is not true that copyright owners would normally license weapon parodies, because if it attacks a set of values cherished by the copyright holder or his fans, he certainly would not allow parodies attacking this. In general, copyright owners do not like to be parodied. (iii) Free speech considerations lead to the conclusion that both types of parody should be protected.

(3) *A parody must have sufficient inner distance from the original.* This comes from the German approach of 'freie Benutzung', the equivalent of fair use. It means that 'the new work has to have, compared to the borrowed personal characteristics of the old work, an inner distance large enough to consider the new work as being independent because of its inherent own creativity'.[294] In other words, the parodist has to add something of his own creativity to make the new work something really new. Again, I agree with this element, because it prevents it from becoming too easy to fall within the protected category of parody; the parodist has to put in a sufficient amount of his own skill and labour.

(4) *The parodist should not copy significantly more than necessary to conjure up the original work.* I do not agree with the word 'significantly'. I would just say that the parodist should not copy more than necessary to conjure up the original work. In the end, the parody defence is an exception and should therefore not be construed to broadly; copying more than necessary to conjure up the original should not be allowed.

(5) *The parody should be in the interest of humour and criticism.* I agree with this proposition, provided that the judge will not have to consider whether it really is funny or critical or not. The decisive factor should be the intention of the parodist.

Taking into account my comments on Rütz's proposal and my earlier findings, I would come to the following parody defence:[295]'Parody does not infringe any copyright in the work provided that the transformative use outweighs any commercial motive and that the parody criticises *either* the copyrighted work or its subject and surroundings, *or contemporary customs and values.* A parody will infringe copyright if it lacks sufficient inner distance from the copyright protected work, especially if it copies *(…)* more than is adequate to conjure up the original work in the interest of *the parodist's intention of* humour *or* criticism.'

[294] C. Rütz, 'Parody: A Missed Opportunity?' (2004) 3 *I.P.Q.* 284.
[295] Words in italics show the differences with Rütz's proposal.

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